



1 IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 32351/2020

Date: 15 September 2023

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES:
YES/NO
- (3) REVISED

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DATE

SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

Applicant

And

NEWNET PROPERTIES (PTY) LTD T/A

SUNSHINE HOSPITAL [MANZHINI]

Respondent

JUDGMENT

MINNAAR AJ.

[1] The applicant seeks an order in the following terms:

1. Condoning the late filing of the rescission application;

2. Rescinding the order of this court dated 9 December 2020; and
3. Costs in the event of opposition.

[2] On 9 December 2020, as per the order by Motha AJ, the respondent obtained judgment against the applicant in the following terms:

1. Judgment in the amount of R1 544 091.44;
2. Interest in [sic] in the amount of 7% per annum from the 14th day after judgment to date of final payment;
3. Costs of suit to be taxed.

[3] The order was granted by default as the applicant failed to defend the action or to ensure appearance on 9 December 2020.

[4] The application is premised on the provisions of Rule 42(1) of the Uniform Rules of Court ('the Rules'), section 173 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 ('the Constitution') and the common law relating to the rescission of judgment.

[5] At the commencement of proceedings the applicant's counsel indicated that the applicant is not persisting with reliance on section 173 of the Constitution.

[6] Before the applicant can enter the fray of the rescission application, the

applicant need to convince this court that the applicant is entitled to the condonation sought in prayer 1 of the notice of motion.

[7] From the answering affidavit it is evident that, following an urgent application brought by the applicant under case number 60330/2021 against the respondent, the parties came to an agreement, and this agreement was then recorded in an order of this court on 3 December 2021.

[8] Of relevance hereto, the court order, granted on 3 December 2021, provided that the applicant will file, by no later than 18 January 2022, applications for the rescission of any of the judgments relevant to the urgent application insofar as the applicant disputes liability on such orders.

[9] It is common cause that the judgment the applicant is seeking to rescind herein, was one of the judgments referred to in the order dated 3 December 2021.

[10] Applicant therefore knew, since 3 December 2021, that condonation herein should be applied for by no later than 18 January 2022.

[11] In the answering affidavit the respondent took the applicant to

task for its failure to apply for condonation in terms of the 3 December 2021 order.

[12] Apart from praying for condonation, the applicant failed to make any averments in support of condonation in the founding affidavit. The founding affidavit in this rescission application was deposed to on 27 January 2022 by Me Mmalemoko Sejeng, a manager: post settlement in the employ of the applicant. The founding affidavit in support of the Rule 27(1) application was deposed to by Me Sunelle Eloff, an attorney and director of the applicant's attorney, on 18 January 2022. It is inconceivable that knowledge of the pending Rule 27(1) was not available on 27 January 2022 when the founding affidavit herein was deposed to. The election to omit same from the founding affidavit, raises serious questions with this court as to how serious the applicant is to correct the alleged wrongs it complains about.

[13] Having had full knowledge that there is a pending Rule 27(1) application, which outcome would have a direct bearing on the rescission application, the applicant nonetheless proceeded with the rescission application and merely asked for condonation without any evidence in support of same in the founding affidavit.

[14] It is only in the replying affidavit that the applicant addressed the order of 3 December 2021. This was done to answer to the allegations

contained in the answering affidavit. According to the applicant, an extension of time was sought from the respondent, but the respondent was not amenable to accommodate the applicant with the indulgence sought. The applicant then proceeded to deliver a formal application in terms of the provisions of Rule 27(1) for condonation, but that application is still pending.

[15] In terms of the provisions of Rule 27 of the Rules, and in the absence of agreement between the parties, the court may, upon application on notice, and on good cause shown, make an order extending or abridging any time prescribed by the rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any steps in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

[16] In terms of section 173 of the Constitution, this court has the inherent powers to protect and regulate its own process, taking into account the interests of justice. I am of the opinion that the provisions of Rule 27(1) cannot interfere with such inherent powers bestowed on this court.

[17] Having regard to the aforesaid, and applying the principle of interest of justice, it still follows that the applicant had to make out its case for condonation in the founding affidavit. Applicant failed in this

regard.

[18] Even if the trite principle, that all necessary allegations upon which the applicant relies must appear in its founding affidavit is ignored, and shifting the focus to the contents of the replying affidavit, the applicant still fails to make out a case for the condonation sought.

[19] In *Ferris v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at 43G to 44A it was stated that condonation cannot be had for the mere asking. In *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at paragraph 14, the Constitutional Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation, the applicant's prospects of success and the importance of the issue to be determined are relevant factors. I pause to state that the facts of this rescission application are not complicated and as such cannot be regarded as 'important issues to be determined'. On the prospects of success, the applicant however faces an uphill battle.

[20] Summons of the action was served on 27 July 2020 and the applicant failed to defend the action. On 9 November 2020 the notice of set down was served and the set down date of 9 December 2020 was

thus brought to the attention of the applicant. All of this is common cause.

[21] Despite having had full knowledge of the action, the applicant elected not to defend same. The reason behind the election not to partake in the proceedings, and to place reliance on the court's judicial oversight are exactly the same as those enunciated in the judgment by Michau AJ in the unreported case of *Road Accident Fund v Dhekiswe Janet Ngobeni obo Phelela*¹. This judgment was handed up in court by counsel for the applicant. I am in agreement with Michau AJ² that the applicant's actions (or lack thereof) leads one to the ineluctable conclusion that there still was a deliberate decision not to attend court.

[22] In *Zuma v Secretary of the Judicial Comission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28, at paragraph 25, the Constitutional Court stated:

"Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it clearly cannot have the effect of turning the order granted in absentia, into one erroneously granted."

¹ Gauteng Division, Pretoria, case no 35926/2017

² Paragraph 16 of the judgment

[23] By these assertions the applicant still has not reached the pinnacle of the hill as the applicant made substantial payment of the default judgment amount and, in doing so acquiesced to the judgment. In the applicant's own words, in paragraph 23.5 of the founding affidavit, it is stated:

"Consequently, the non-attendance by the applicant at any court proceedings is not wilful or an abuse of the process nor is it aimed at frustrating the fair, reasonable, and just settlement of any claim. It is for this reason that the applicant has paid a portion of the claim, which was fair, reasonable and statutorily compliant."

[24] In *Lodhi 2 Property Investments CC v Bondev Developments* 2007(6) SA 87 at paragraph 27 the following is stated:

"Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if

subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

[25] The defences relied on by the applicant was at the applicant's disposal at the time the default judgment was granted and as such same cannot now, subsequently be disclosed and relied upon. Applicant has no prospects of success should it be permitted to defend the action.

[26] I cannot find any support in the applicant's case that the judgment was erroneously sought and/or granted in its absence and as such the provisions of Rule 42 does not prevail herein.

[27] Equally so, the applicable principles in the common law does not assist the applicant at all. Insofar as the application is considered on common law grounds, the applicant must show sufficient cause to rescind the judgment. This means that there must be a reasonable explanation for the default,³ and the applicant must show that the applicant has a *bona fide* defence that exists, which *prima facie* has

³ *De Wet v Western Bank Ltd* 1972(2) SA 1031 (A); *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)

some prospects of success.⁴ The applicant failed to meet these requirements.

[28] Respondent is seeking punitive costs against the applicant. The manner in which the applicant approached this application for rescission is frowned upon, as the rescission application was pursued without having complied with the order to apply for condonation. Applicant further has elected not to defend the action despite proper service and has no prospects of success in defending the action. As such, there is no basis why punitive costs should not be ordered.

[29] Consequently, I make the following order:

1. The application is dismissed with costs on the scale as between attorney and client.

Minnaar AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

⁴ *Grant Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476

Heard on : 4 September 2023

For the Applicant / Plaintiff : Adv. C Rip

Instructed by : Malatji & Co Attorneys

For the Defendant : Adv. M van Rooyen

Instructed by : Kritzinger Attorneys

Date of Judgment : 15 September 2023